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JAN 23 1998

Federal Communications Commission  
Office of Secretary

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
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SOUTHWESTERN BELL MOBILE )  
SYSTEMS, INC. )  
 )  
Petition for a Declaratory )  
Ruling Regarding the Just )  
and Reasonable Nature of, )  
and State Law Challenges )  
to, Rates Charged by CMRS )  
Providers When Charging )  
for Incoming Calls and )  
Charging for Calls in )  
Whole-Minute Increments )  
 )

File No. 97-31

DA 97-2464

TO: The Commission

REPLY COMMENTS OF  
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

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January 23, 1998

### SUMMARY

On November 12, 1997, SBMS filed a Petition requesting the Commission to declare that state-law based suits directly or indirectly challenging charges for incoming CMRS calls and charges for CMRS calls in whole-minute increments are barred by Section 332(c)(3) of the Communications Act. SBMS also requested the Commission to declare that such charges are not unjust or unreasonable under Section 201(b); to make certain declarations regarding the meanings of the terms "rates charged" and "call initiation" in the CMRS industry; and to declare that the Congress and the Commission have preferred competition over regulation in the wireless industry.

The Comments filed in response to the Commission's Public Notices overwhelmingly support the SBMS Petition. The only two commenters who oppose the Petition are the plaintiffs' class action attorneys in two of the many pending lawsuits throughout the country which give rise to the need for the declaratory ruling SBMS has requested.

For the reasons discussed below, the arguments of the class action lawyers -- particularly the arguments by one of the plaintiffs attempting to distinguish its claims from the types of claims barred by Section 332(c)(3) -- underscore the need for Commission action. Similarly, the comments of the lawyers regarding the "savings" clause and

the filed rate doctrine are incorrect. Accordingly, the SBMS Petition should be granted.

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REPLY COMMENTS OF  
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Petitioner Southwestern Bell Mobile Systems, Inc.  
("SBMS") files this Reply to the Comments which have been  
filed in this proceeding.

INTRODUCTION

On November 12, 1997, SBMS filed a Petition ("SBMS  
Petition") requesting the Commission to make several  
declarations regarding both charges for incoming CMRS calls  
and charges for CMRS calls in whole-minute increments. In  
particular, SBMS requested the Commission to declare that  
state-law based suits or claims directly or indirectly  
challenging such CMRS charges are barred by Section

332(c)(3) of the Communications Act. SBMS also asked the Commission to declare that charges for incoming calls and charges in whole-minute increments are not unjust or unreasonable under Section 201(b). SBMS further requested that the Commission rule on the meanings of the terms "rates charged" and "call initiation" in the CMRS industry, and requested a ruling regarding the federal government's preference for competition over regulation in the wireless industry. All of these requests can be granted on the record now before the Commission. In fact, of these requests, only Section 332(c)(3) preemption and the definition of "call initiation" are challenged in the comments submitted; thus, these are the only issues discussed in detail in these Reply Comments.

The comments filed in response to the Commission's Public Notices<sup>1</sup> overwhelmingly support the SBMS Petition. In fact, the only two commenters who oppose the Petition are plaintiffs' class action attorneys in current CMRS-related litigation which gave rise to the need for the SBMS Petition. For the reasons discussed below, the arguments

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<sup>1</sup> See Public Notices, In re Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, DA 97-2464, File No. 97-31 (released November 24, 1997) (inviting comments and reply comments) and (released December 22, 1997) (extending deadline for comments and reply comments).

in those comments are incorrect, and the SBMS Petition should be granted.<sup>2</sup>

#### ARGUMENT

##### A. Supporting Comments

As noted above, virtually all of the Comments -- except for those filed by the class action attorneys -- fully support the SBMS Petition.<sup>3</sup> In particular, these

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<sup>2</sup> On January 21, 1997, SBMS entered into a "Global Class Action Settlement Agreement" in a lawsuit pending in Illinois state court in which, among other claims, the plaintiffs asserted that inadequate disclosure of CMRS charges in whole-minute increments violates Section 201(b) of the Communications Act as an unjust practice. Penrod v. SBMS, No. 96-L-132 (Circuit Court, Third Judicial District, Madison County, Ill.). That day, the court entered an "Order Granting Preliminary Approval of Settlement" which, among other things, certified the class, for settlement purposes, as consisting of all wireless telephone (cellular or PCS) customers of SBMS and its affiliate, Southwestern Bell Wireless Inc. ("SBWI"), throughout the United States. It is not certain when or whether a final judgment will be entered in this case and, in any event, it would apply only to SBMS and SBWI, and not to other cellular or PCS carriers throughout the country which are defendants in other class action cases and whose interests are directly implicated by this Declaratory Ruling proceeding. Moreover, the Illinois case addresses charges in whole minute increments, and not the imposition of charges for incoming calls, which is an important issue in this proceeding. Thus, SBMS continues to urge that the Commission grant the SBMS Petition and issue the requested declaratory rulings.

<sup>3</sup> For example, AirTouch Communications "agrees wholeheartedly with the Petition." AirTouch Comments at 1. Ameritech "fully supports" the SBMS Petition. Ameritech Comments at 2. Century Cellunet also "fully agrees with SBMS." Century Cellunet Comments at 1.

Comments supplement and reinforce the factual and legal bases of the SBMS Petition on several grounds.

First, the scope of the problem is clear. It is beyond dispute that there is a large number of lawsuits pending against CMRS providers which challenge whole-minute charges and charges for incoming calls. Bell Atlantic Mobile ("BAM"), for example, notes that an "extraordinary number of [such] actions [have been] filed nationwide against cellular carriers" and further states that BAM itself "faces complaints which raise all of [SBMS's] same issues as well as other claims, in multiple jurisdictions."<sup>4</sup> Similarly, Comcast states that the "[CMRS] industry is currently inundated with class action lawsuits challenging virtually every aspect of wireless service," including "the rates charged for cellular airtime."<sup>5</sup> AT&T Wireless adds that, "like other carriers, [it] has been subjected to lawsuits under state and federal law challenging charging for incoming calls and billing in whole-minute increments."<sup>6</sup> As GTE notes, the per-minute cases in particular "typically allege fraud and breach of

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<sup>4</sup> Bell Atlantic Mobile Comments at 2, 4.

<sup>5</sup> Comcast Comments at iii.

<sup>6</sup> AT&T Wireless Comments at 9. GTE notes that "[s]ince 1993, plaintiffs' attorneys have filed at least 20 class action suits in state court . . . seeking to recover damages against service providers charging for cellular service on a per-minute basis." GTE Comments at 2.

contract," although they "[i]n substance, . . . seek a retroactive cellular rate reduction."<sup>7</sup> These facts underscore the pressing need for the Commission to resolve the issues presented in this proceeding.<sup>8</sup>

Moreover, these commenters universally agree that charges for incoming CMRS calls and charges in whole-minute increments are long-standing and well-accepted. BellSouth, for example, notes that "charging in whole minute increments has . . . long been present and approved of in the CMRS and long distance industries" and that "[c]harging for incoming calls is also common in the CMRS industry and has been long accepted."<sup>9</sup> Nextel adds that consumers are well aware of these CMRS charges, noting that they "are very familiar to wireless telecommunications customers."<sup>10</sup> PrimeCo too observes that these charges "are well-known and long-standing within the wireless industry."<sup>11</sup> As AT&T

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<sup>7</sup> GTE Comments at 2.

<sup>8</sup> SBMS agrees with several commenters who argue specifically for a rapid resolution of this proceeding by the Commission. AirTouch, for example, urges that SBMS's requested ruling should be granted "as soon as possible." AirTouch Comments at 1, 5. AT&T Wireless argues for an "expeditious[]" ruling by the Commission. AT&T Wireless Comments at 9.

<sup>9</sup> BellSouth Comments at 5-6.

<sup>10</sup> Nextel Comments at 6-7.

<sup>11</sup> PrimeCo Comments at 2. Sprint PCS adds that "[t]he one-minute increment . . . has been a standard time unit in telephony for many years." Sprint PCS Comments at 6.

states, the Commission recently stated that the "typical [CMRS] price structure" includes charges to the subscriber for air time use "regardless of whether the subscriber places or receives the call."<sup>12</sup>

The Comments also show that, although such charges are widespread in the CMRS industry, the competitive nature of the wireless marketplace has led to a wide variety of charging options for consumers.<sup>13</sup> For example, the Rural Telecommunications Group ("RTG") found that the billing increments offered by its members now varied among whole-minute increments, half-minute increments, per six-second increments, and flat fee plans.<sup>14</sup> RTG also noted that its members' competitors billed on both a per-minute and per-second basis.<sup>15</sup>

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<sup>12</sup> AT&T Wireless Comments at 8 (quoting Notice of Inquiry, In re Calling Party Pays Service Option in the Commercial Mobile Radio Services (WT Docket No. 97-207), FCC 97-341, ¶ 16 (released Oct. 23, 1997)).

<sup>13</sup> Nextel, for example, bills its customers in per-second increments, Nextel Comments at 3, and advertises that fact as differentiating its service from the customary whole-minute CMRS charges that customers expect.

<sup>14</sup> RTG Comments at 2. Some respondents were also in the process of converting to per-second billing. Id.

<sup>15</sup> RTG Comments at 2. With respect to the options available for charging for incoming calls, Nextel notes that "Sprint PCS and AT&T Digital PCS offer customers the first minute free on every incoming call." Nextel Comments at 3. PrimeCo adds that it "does not charge for the first minute of incoming calls." PrimeCo Comments at 10. AT&T Wireless, moreover, notes that

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The use of such options has become a competitive tool. For example, Nextel notes that it "has differentiated its pricing plans from cellular and PCS by offering customers per-second rounding rather than per-minute rounding."<sup>16</sup> Omnipoint points out that "[c]harging in different increments of time is one way for a CMRS carrier to distinguish itself, which increases market competition."<sup>17</sup> If the states were to require per-second billing (or any other particular method of charging for calls), the pro-competitive -- and pro-consumer -- effect of having a variety of charging options would be lost. These comments are also unanimous in agreeing that state law regulation of such charges is preempted by Section 332(c)(3).

**B. "Opposing" Comments**

The comments of the plaintiffs' class action lawyers take issue with several of SBMS's legal and factual arguments. These comments, however, actually illustrate precisely why the kinds of lawsuits they have brought are preempted.

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[Footnote continued from previous page]  
carriers are experimenting with "calling party pays" plans. AT&T Wireless Comments at 8.

<sup>16</sup> Nextel Comments at 3.

<sup>17</sup> Omnipoint Comments at 4.

1. Smilow Comments

One of the opposing comments was filed by the law firm whose Massachusetts lawsuit, Smilow v. SBMS, was a catalyst for the SBMS Petition. Significantly, however, it should be noted that the Smilow Comments do not actually take issue with several of the declarations requested in the Petition, such as the inherent just and reasonable nature of the charges at issue. Rather, perhaps realizing the broad preemptive scope of Section 332(c)(3), the Smilow Comments attempt in large part to differentiate the Smilow claim from the types of claims which they concede are barred by Section 332(c)(3) in order to preserve their claim while others are preempted. The Smilow litigation is, nevertheless, a prime example of the type of suit which should be barred by Section 332(c)(3) and highlights why Commission action is necessary.

The Smilow Comments attempt to make a point of the fact that SBMS did not include the Smilow complaint with its Petition nor did SBMS discuss Smilow's particular contract in that filing.<sup>18</sup> As discussed above, however, there are scores of suits across the country which challenge CMRS per-minute charges and charges for incoming

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<sup>18</sup> See Smilow Comments at 1, 2, 8.

calls. Several of these suits target SBMS.<sup>19</sup> It is true that the order by Judge Keeton in the Smilow case -- in which he sought FCC involvement regarding the CMRS charges at issue in that case -- was a catalyst for the filing of the SBMS Petition at the Commission. However, SBMS did not seek to limit its Petition to that case, since the types of lawsuits SBMS addressed are widespread and the problems they create are general in nature. Nevertheless, since the Smilow Comments focus to such a great extent on the Smilow contract -- and theirs is one of only two comments opposing the SBMS Petition -- we will address the Smilow contract.

Specifically, the Smilow Comments argue that the contract at issue in the Smilow case expressly called for per-second billing (presumably with all seconds to be billed at the same rate) and expressly stated that incoming calls are free. Thus, Smilow's lawyers suggest that theirs is a simple breach of contract case in which the court can calculate damages by performing a simple arithmetic calculation whose application is beyond dispute.<sup>20</sup>

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<sup>19</sup> See note 3, supra.

<sup>20</sup> The Smilow Comments argue that the damages "would be the amount of money [SBMS] charged Smilow and the members of the class for [] overbilled time at the 'rates' in effect when those calls were made." Smilow Comments at 15. Smilow posits that the calculation of damages involves application of a simple equation which it states as "Price = Rate x Units of Service." Smilow Comments at 15. Smilow later adds that "[t]he rates are not at issue -- only the number of minutes for which  
[Footnote continued on next page]

However, even a cursory review of the Smilow contract shows that it actually bears no resemblance to the contract Ms. Smilow's lawyers purport to describe in their comments. Specifically, nowhere does that contract say that calls will be billed in per-second increments -- much less that all seconds will be billed at the same rate. In the absence of any such provisions, the only way for the court to assess the damages sought in Smilow would be for it to select, from among a wide variety of possible billing options, a rate plan providing for per-second billing where each second is billed at the same rate. This would clearly engage the court in the regulation of CMRS rates in violation of Section 332(c)(3).

In addition to being improperly imposed by a court, this rate structure does not even make sense. Specifically, there is no reason to believe that if a CMRS provider were no longer allowed to bill on a per-minute basis it would necessarily both bill on a per-second basis and set the per-second rate at 1/60 of the former per-minute rate. While the first assumption is a possible result of a carrier being barred from charging in whole-minute increments (though it would be only one of many possible options the carrier might choose), the second

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[SBMS] can charge must be determined by the Court."  
Smilow Comments at 17.

assumption is almost certainly wrong. A rational carrier forced to change its charging structure from per-minute to per-second charges would not establish its new per-second charge simply by dividing its former per-minute charge by 60.

The Commission's staff has noted that such a choice would not allow the carrier to recover its costs: the carrier's revenue would decline while its operating expenses would remain the same.<sup>21</sup> As the Commission's analysis suggests, if forced by a court to bill on a per-second basis, the carrier would be forced by basic economics either to charge a higher rate per second than 1/60 of the former per-minute charge, institute an additional charge fully to recover its costs, or charge the initial seconds of a call at a higher rate than the subsequent seconds. Thus, Smilow's lawyers not only would have the courts engage in rate regulation, they would have them regulate CMRS rates in an irrational and retroactive way.

Simply put, the Smilow contract does not state that calls will be billed on a per-second basis; it does not set

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<sup>21</sup> See Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (dated Dec. 2, 1993) (attached as Appendix A to the SBMS Petition) ("If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per-second rates at a level designed to recover the revenues that were generated by the previous rates.").

a per-second rate; and it does not preclude rounding.<sup>22</sup>

For the court to say that billing must be on a per-second basis; that a particular per-second rate applies; and that there can be no rounding inevitably involves the court in rate regulation since it would be choosing a rate plan for the carrier.<sup>23</sup>

This is not to say that there is no role whatsoever for the courts in enforcing CMRS contracts. As SBMS stated in its Petition, a "state may regulate . . . whether the

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<sup>22</sup> The Commission, as requested in the SBMS Petition, should clarify for the courts that even with contract terms like those Smilow points to, *i.e.*, that chargeable time begins with "call initiation" and ends when call disconnect is confirmed -- billing in whole-minute increments is a standard industry charge and that customers expect to be billed in this manner. It should also clarify that such terms do not mean that calls will be billed on a per-second basis and has not been understood to mean that in the past. The Commission should make clear that since telephone calls have been billed on a rounded up, per-minute basis, it would be expected that if billing were to deviate from this charge, the agreement would state that call time would be calculated on a per-second basis and a per-second rate would be set out. For cellular customers in Massachusetts, this expectation was likely reinforced by the fact that, for years, SBMS's tariff filed with the Massachusetts Department of Public Utilities provided for charging for incoming calls and charging in whole-minute increments.

<sup>23</sup> As requested in the SBMS Petition, the Commission should declare that "rates charged," for purposes of Section 332(c)(3) clearly means, at a minimum, a carrier's determination of what it will charge for and how much it will charge for it. Smilow wants those decisions governed by state law, while Congress has determined that the states and state courts cannot do so.

correct CMRS rate was applied."<sup>24</sup> Thus, if a CMRS carrier charged rates at variance with the clearly enunciated and agreed-upon rate -- for example, the customer was charged 50¢ per minute while the rate for calls was to be billed at 25¢ per minute -- it might be appropriate (depending on other circumstances of the case) for a court to find a breach of contract and award damages. Similarly, if the Smilow contract and customer service materials stated that SBMS would bill its customers on a per-second basis, and that each second would be billed at the same rate, and established a per-second rate -- and yet SBMS still billed its customers on a rounded-up, per-minute basis -- judicial action might be warranted, and not in conflict with Section 332(c)(3).

The Commission should urge the courts, however, carefully to scrutinize such claims to ensure that no CMRS rate-regulation would be involved in their rulings. This position is supported, for example, in the comments of Comcast which has requested the Commission to "instruct all courts to carefully scrutinize claims pleaded in terms of 'nondisclosure'" to see if their central thrust is an attack on "federally preempted rates or practices."<sup>25</sup>

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<sup>24</sup> SBMS Petition at 14 n.26.

<sup>25</sup> Comcast Comments at 24, 26 (emphasis removed).

Moreover, the Commission should stress that courts, in reviewing a CMRS contract to ensure that a case raises only a simple breach of contract claim whose resolution would not involve the court in rate regulation, should keep in mind the well-established and reasonable nature of charging in whole-minute increments and charging for incoming calls, and should be reluctant to construe contracts as departing from these charges unless they clearly do so.

Indeed, the Smilow court indicated that the Commission's views on these specific subjects would be relevant to its interpretation of the contract in that case. The Smilow court said:

[I]t is at the least a reasonable hypothesis and perhaps a probability . . . that some aspects of this dispute can be resolved on grounds of national communications policy and practice within the area as to which the FCC has special competence. Contracts between parties are to some extent subject to overriding national policy manifested in legislation and decisions of an administrative agency authorized by Act of Congress to act in a specialized field. It is doubtful indeed that this dispute can be resolved simply on the basis of the contract law of one or another or more than one of the various states.<sup>26</sup>

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<sup>26</sup> Memorandum and Order, Smilow v. SBMS, Civ. A. No. 97-10307-REK, at 8 (D. Mass. July 11, 1997) (emphasis added).

Other courts should be urged to do so as well.

Finally, contrary to the suggestion in the Smilow Comments, the Commission should clarify that "call initiation" in the CMRS industry is understood to mean both the placing of outgoing calls and the acceptance of incoming calls by a cellular subscriber.<sup>27</sup> The Smilow Comments dismiss this definition as "sophistry" and "contrary to the [term's] plain meaning."<sup>28</sup> Notably, however, Smilow makes no reasoned argument against SBMS's position, and statements throughout the various other comments support this interpretation of "call initiation"<sup>29</sup> and demonstrate that that term is, in fact, commonly understood to have the meaning SBMS and others have described. The Smilow court indicated that an interpretation of the "call initiation" term might be essential to a resolution of the Smilow dispute and that the Commission, with its particularized experience and expertise, might be in a better position to set out the term's definition.<sup>30</sup> Thus, it is particularly appropriate

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<sup>27</sup> See also SBMS Petition at 11-12.

<sup>28</sup> Smilow Comments at 10 n.8.

<sup>29</sup> See, e.g., Liberty Cellular, Inc. and North Carolina RSA 3 Cellular Telephone Company Comments at 4-5; Cellular Telecommunications Industry Association Comments at 12.

<sup>30</sup> As the court said: "In deciding whether Chargeable Time should include calls not initiated by the mobile  
[Footnote continued on next page]

for the Commission to grant the declaration requested by SBMS and clarify that the term "call initiation" is employed in CMRS contracts to describe the action taken by a CMRS user to activate and terminate connection to the cellular network by pressing the "SEND" and "END" buttons, whether that action accepts an incoming call or places an outgoing call.

## 2. Savings Clause

Both the Smilow Comments and the McKay/Sommerman Comments (the Comments of the other plaintiffs' class action attorneys) argue that the Communications Act's "savings clause" preserves their state-law-based claims, notwithstanding Section 332(c)(3).<sup>31</sup> This attempted reliance on the savings clause is misplaced.

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service user under the terms of the Contract, or methods of calculating the Chargeable Time for cellular phone calls under the Contract, a decisionmaker (whether the FCC, a court, or a court and jury) may have to evaluate technical and policy considerations relating to cellular phone service. The FCC . . . may be better qualified to make some of the evaluative choices that full resolution of this dispute will require. It is at least a likely possibility, then, that the FCC is a more appropriate initial decisionmaker than a United States district court." Memorandum and Order, Smilow v. SBMS, Civ. A. No. 97-10307-REK, at 8-9 (D. Mass. July 11, 1997) (emphasis added to sentence).

<sup>31</sup> Smilow Comments at 11; McKay/Sommerman Comments at 5-7.

Although Section 414 of the Act preserves certain state law actions in certain situations, the courts have been virtually unanimous in holding that the actions preserved must not conflict with the provisions of the Act.<sup>32</sup> For example, as one federal district court stated, the savings clause preserves only those "[s]tate-law remedies which do not interfere with the Federal Government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the [Communications] Act."<sup>33</sup> In the Smilow case and those like it, however, the state law claims conflict with the express preemption provision of Section 332(c)(3). In fact, one court has already been faced with the savings clause argument Smilow puts forth and has recognized that Section 332(c)(3) preemption governs, notwithstanding the savings clause. The court said that "the savings clause cannot plausibly be read to preserve state law claims which directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act."<sup>34</sup> In effect, the reading Smilow

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<sup>32</sup> Notably, none of the cases Smilow or McKay/Sommerman cite in support of their savings clause arguments deal with Section 332(c)(3) -- or, in fact, any preemptive provision of the Act.

<sup>33</sup> MCI Telecomm. Corp. v. Graphnet, Inc., 881 F. Supp. 126, 131 (D.N.J. 1995).

<sup>34</sup> In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1205 (E.D. Pa. 1996).

and McKay/Sommerman suggest would lead to the impermissible result of allowing "[a] general remedies savings clause . . . to supersede [a] specific substantive preemption provision."<sup>35</sup> Moreover, it is paradoxical at best to argue that what Section 332(c)(3) specifically takes away, Section 414, enacted 50 years earlier, gives back. The Commission should reject the Smilow and McKay/Sommerman savings clause arguments.

### 3. Filed Rate Doctrine

The Smilow Comments attempt to refute SBMS's argument -- that the types of damage awards at issue in the SBMS Petition amount to CMRS rate regulation -- by asserting that several cases SBMS cites in its Petition "are distinguishable from the facts in the Smilow Action

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<sup>35</sup> Carstensen v. Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992)), cert. denied, 116 S. Ct. 182 (1995).

The statements in the McKay/Sommerman Comments regarding complete preemption, see McKay/Sommerman Comments at 2-3, 4, 8, are utterly inapposite. "Complete preemption" refers to the conversion of a state-law claim into a federal claim for the purposes of removal jurisdiction and the well-pleaded complaint rule. See, e.g., State of Vermont v. Oncor Communications, Inc., 166 F.R.D. 313, 318 (D. Vt. 1996). This argument is not put forth by SBMS in its petition and is not one pursued here. SBMS argues, rather, that Section 332(c)(3) specifically preempts the actions brought here, a completely separate argument. See, e.g., Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir. 1997); Giddens v. Hometown Financial Servs., 938 F. Supp. 801, 805 (M.D. Ala. 1996).

because in those . . . cases, the court found that plaintiffs' claims were barred by the 'filed rate doctrine,' " and CMRS providers are not required to file tariffs.<sup>36</sup> This argument, however, completely misreads SBMS's references to the filed rate doctrine cases and also misreads the relevant caselaw.

In its Petition, SBMS did not argue that the filed rate doctrine applies to CMRS providers. Instead, SBMS cited the filed rate doctrine cases because they establish that courts will hold that damage awards in cases such as Smilow's purported breach of contract action do effect a change in -- and regulation of -- rates. In the filed rate doctrine cases SBMS cited, the courts held that they could not award damages because the filed rate doctrine barred the courts from effecting a change in certain telephone rates and the damage awards sought effected just such a change in rates. These cases thus show that damage awards in cases like Smilow would also be considered to effect a change in rates; similarly, they would therefore be barred by Section 332(c)(3) -- not the filed rate doctrine -- as an impermissible change in -- and regulation of -- CMRS rates. The precedents SBMS cited show that the courts are precluded from acting on Smilow-like claims. Thus, the

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<sup>36</sup> Smilow Comments at 13.

Commission should reject the filed rate doctrine argument set forth in the Smilow Comments.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the SBMS Petition and the supporting Comments, the Commission should grant all aspect of SBMS's Petition for Declaratory Ruling.

Respectfully submitted,

  
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January 23, 1998

CERTIFICATE OF SERVICE

I, Barry Kreiswirth, hereby certify that on this 23rd day of January 1998, a copy of the foregoing Reply Comments of Southwestern Bell Mobile Systems, Inc., has been served by first-class mail, postage prepaid (or, in the cases of those persons whose names are preceded by an asterisk, by hand delivery), to the following persons:

- \* The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554
- \* The Honorable Susan Ness  
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